

NGUYEN (Migration) [2019] AATA 4639 (27 September 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Khanh Tuan NGUYEN
CASE NUMBER:	1724987
HOME AFFAIRS REFERENCE(S):	BCC2016/675712
MEMBER:	Hugh Sanderson
DATE:	27 September 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 27 September 2019 at 4:14pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – sharing of day-to-day expenses – household arrangements – social aspects – commitment to relationship – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 17 February 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

5. The applicant is a citizen of Vietnam and is currently 26 years old. He is sponsored by his wife, Hoang Mai Thao Nguyen, who is 23 years old and was born in Vietnam and is a Vietnamese citizen. She has been granted a Subclass 143 Contributory Parent visa and has the right to reside permanently in Australia. Her parents and brother reside in Australia.
6. The parties claim they first met each other in November 2012. The parties' fathers were friends in Ho Chi Minh City before the applicant's family moved to Can Tho. The applicant's family had a business which involved travelling to Ho Chi Minh City and as a result during 2013 the applicant met and then would visit the sponsor. After the sponsor turned 18, their relationship developed further and on 13 February 2015 the applicant proposed marriage to the sponsor.
7. At that time, the sponsor's parents had applied for a Contributory Parent visa sponsored by their son and the sponsor was included as a member of their family unit. The applicant at that time was attending Can Tho University and when he graduated he applied to study in Australia. He was granted a Subclass 573 Student visa and entered Australia on 21 April 2015. The sponsor and her parents entered Australia on the Subclass 143 Contributory Parent visa on 15 August 2015.
8. The applicant at the time was studying in Melbourne and the sponsor was living with her family in Sydney. The sponsor travelled to Melbourne to spend time with the applicant and the applicant on occasions travelled to Sydney. The applicant and the sponsor asked their families for approval of the relationship and in December 2015 the applicant again proposed marriage to the sponsor and she agreed with the approval of their families. The parties were married on 30 January 2016. After the parties were married, the applicant moved from Melbourne to live with the sponsor's family in Sydney. The parties returned to Vietnam together on 11 March 2017 to have a wedding celebration in Vietnam with the applicant's family.
9. The parties provided various documents in support of the application including the following:
 - Statements by friends and family supporting the application;
 - Photos of the parties together in Sydney, Melbourne and Vietnam and with various family members;

- Receipts for the purchase of various items of personal property;
 - Evidence of the parties travel to Vietnam and staying together in Melbourne; and
 - Correspondence, including payslips, addressed to the parties at the home they shared.
10. The delegate who considered the application noted the information that had been provided, but was not satisfied that any of the information provided convincing reasons why the parties would be considered to be in a genuine and continuing relationship. The delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner and therefore found the applicant did not meet the criteria in cl.820.211 and refused the application.

Information to the Tribunal

11. The parties provided further documents to the Tribunal including the following:
- Joint bank account details showing the parties salary being deposited into that account;
 - Photos of the parties at various social events including attending a friend's wedding;
 - Receipts for various items of personal property;
 - Tax returns identifying each other as their spouse;
 - Correspondence addressed to the parties at their shared residence;
 - Statements by friends in support of the application;
 - Joint residential tenancy agreement dated 15 May 2016; and
 - Statement by the applicant.
12. In light of the material provided by the applicant to the Tribunal, the Tribunal has proceeded to a decision without the need for a hearing.
13. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act of the sponsoring partner..

Whether the parties are in a spouse or de facto relationship

15. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who has the right to reside permanently in Australia.

16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 30 January 2016. There is nothing to indicate that the parties marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

18. The parties are young and neither have any significant assets of their own. It is not surprising, therefore, that they do not jointly own any significant assets. They have purchased a motor vehicle together and various continuing expenses for that vehicle, such as insurance, are in their joint names. A loan obtained for the purchaser motor vehicle is in their joint names and the repayments are made from their joint bank account. Evidence has been provided of their purchase of items of personal property, including jewellery for the sponsor, which has been paid for out of their joint bank account.
19. The parties, prior to their relationship, each had bank accounts in their sole names. Those accounts remain active, however, both parties have signed authorities to allow the other access to those accounts. They have opened a joint bank account into which their wages are deposited. The details provided in the bank account statements indicate the parties are using this account to meet their day-to-day household expenses.
20. Overall, the financial aspects of the relationship indicate the parties are pooling their financial resources and are sharing their day to day household expenses. Although limited, they have purchased items together and have shared liabilities, including those liabilities for the household. The Tribunal finds the financial aspects of the relationship supports a finding that the parties are living together in a shared household and that their relationship is genuine and continuing.

Household

21. The parties have been living together since they were married with the family of the sponsor. They were originally living at an address in Fairfield West and moved to a new home at Fairfield East in May 2016 with the sponsor's family moving with them. The applicant's and sponsor's name are identified as the primary tenants for that property.
22. The parties provided numerous documents addressed to them at the homes they have shared. This includes their bank statements, telephone accounts, insurance documents,

receipts for the purchase of personal property, driver's licenses and tax returns. All these documents support a finding that the parties are living together in a shared household.

23. The parties provided evidence of the arrangements within the household. This is supported by evidence of other family members. The arrangements described in that household are typical of a blended family, particularly taking into account the fact that the applicant and the sponsor are working and the sponsor's parents are able to carry out most of the housework.
24. Overall, the Tribunal is satisfied the evidence supports a finding that the parties have established a household together indicative of their living together in a genuine and continuing relationship with a mutual commitment to a shared life as husband and wife.

Social aspects

25. The parties provided numerous photos of themselves together at various social events. This includes the parties together in Melbourne where the applicant was originally living in Australia, in Vietnam when they returned together in March 2017 to celebrate their marriage with the sponsors family there, and at other locations in Australia. The wedding photographs show that the parties conducted elaborate celebrations both in Australia and in Vietnam. The parties have also been invited to weddings of their friends and the photos show themselves together at those events. The sponsor is a practising Catholic and photos have been provided of the parties together at the sponsor's church and other social events organised by that church. Photos have been provided of the parties together at other social events. The photos provided appeared typical of the parties genuinely celebrating events with friends and family and not staged for immigration purposes.
26. The parties provided statements from friends and family members supporting the application and indicating the parties represent themselves as being married to each other. The invitation sent to the parties to attend weddings for their friends indicate they represent themselves as being married to their friends and family.
27. The parties have undertaken numerous social activities together, including in participating in various events through the sponsor's church. Evidence has been provided of the parties attending other social activities together. They have plans for future social activities, including hopefully having the sponsor's parents visit them in Australia.
28. The Tribunal is satisfied the social aspects of the relationship indicate the parties live together and have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The parties are recognised as being in a genuine and continuing relationship.

Commitment to the relationship

29. The parties have known each other since 2012. A serious relationship developed between them in 2014 and continued even though the parties living in different cities in Vietnam and when they moved to Australia. The fact that they were able to maintain this long distance relationship indicates the level of commitment they had to their relationship. They have been living together with the sponsor's family in Sydney since their marriage. They have now been married for over three years.
30. The applicant provided details of the difficulties he had with his previous migration agent and the migration agent's failure to provide documents to the Department or notify the applicant of any issues the Department had raised.

31. The applicant has provided information as to the parties' plans for their future together. The plans provided are realistic in light of the parties' age and their current financial situation. The applicant also addresses various medical issues the sponsor faces. This information indicates the parties have spoken about their future and provide each other the degree of companionship and emotional support which would be expected in a genuine relationship.
32. The Tribunal is satisfied that the level of commitment the parties shown to their relationship indicates that they are in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Overall assessment

33. The Tribunal has considered the information provided in support of the application both individually and cumulatively. It appears that when the applicant initially applied for the visa he was poorly represented by his immigration agent. The applicant has subsequently provided material to the Tribunal in support of the application. The information provided by the applicant in support of the application is credible and extensive. In light of the information provided to the Tribunal, the Tribunal is satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that their relationship is genuine and continuing and that they lived together. The Tribunal is satisfied that these criteria were met at the time of the application and continue to be met at the time of this decision.
34. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore the applicant meets cl.820.211(2)(a) and continues to meet this criteria the time of the decision.
35. At the time of the application the applicant was sponsored by the sponsoring partner who is his spouse and has turned 18 years of age. She continues to sponsor him. Therefore the applicant meets cl.820.211(2)(c) and continues to meet this criteria at the time of the decision.
36. The applicant held a Subclass 573 Student visa at the time of the application. As he held a substantive visa at the time of the application the criteria in cl.820.211(2)(d) is not relevant.
37. For the above reasons the Tribunal finds the applicant meets cl.820.211(2) and as he continues to meet the criteria meets cl.820.221.
38. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

39. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).